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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 77-5427

BERNARDO MORENO DAVILA,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Bernardo Moreno Davila, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the Petitioner's conviction of wire fraud in violation of 18 U.S.C. § 1343.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix, hereinafter cited "App.," *infra,* p. A1), is not reported. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing and Petition for Hearing En Banc (App. *infra,* p.A5), is not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 10, 1979 (App., *infra,* p. A1). The order of the Court of Ap-

peals denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc was entered on May 24, 1979 (App., *infra* p.A5) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (b), and Rule (19) (1) (b) and 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

1. WAS THE USE OF WIRED MONEY ORDER INTERSTATE COMMERCE WITHIN THE SCOPE OF THE ACT.

STATUTES INVOLVED.

18 U.S.C. § 1343 reads:

> Fraud by wire,... Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property, by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE.

Bernardo Moreno Davila was indicted on May 10, 1977, in a fifty count indictment charging violation of 18 U.S.C. § 1343: wire fraud. A plea of not guilty was entered and on May 16, 1977, a jury trial was commenced on all counts. On May 23, 1977, the defendant was convicted on all counts and on June 14, 1977, was sentenced to imprisonment for a period of three (3) years on each count, with the sentence imposed in Counts 2 through 50 to run concurrently to the sentence imposed in Count 1, making a total term of imprisonment of three (3) years. From this conviction and sentence this appeal has been taken.

The operative facts that are pertinent to the question presented show that money orders were wired from San Antonio, Texas, to McAllen, Texas. Incidental to the wiring of the money order the electronic signal would pass through a computer terminal in Middletown, Virginia. In fact anytime a Western Union money order is sent anywhere in the country, it travels through a computer terminal in Middletown, Virginia for record keeping purposes (R. Vol. II 29). The government contends that a scheme to defraud Western Union was fashioned by the Defendant and one Alexander Tarasuk, and that because the electronic signal passed from Texas to Virginia and back to Texas a violation of 18 U.S.C. § 1343 occurred.

The Defendant entered into business dealings with Alexander Tarasuk who was an agent of Western Union (R. Vol. I 43) and who operated an office at the local produce terminal in San Antonio, Texas. As a contract agent Tarasuk would wire money to various produce companies, employers, or drivers. The contract between Western Union and Tarasuk required that the principal sum to be wired be prepaid to the agent and tendered to Western Union when the total reached $200.00, but not less than once each week. (R. Vol. II 43; Gov't's Exhibit No. 201). In 1967 as a general practice and mode of operation Tarasuk would wire money to customers without collecting the principal or fee (R. Vol. II 45). In 1967 the Defendant began availing himself of this Western Union service as operated by Tarasuk and began receiving Western Union money orders without prepaying the principal or fee (R. Vol. II 46). Under the practice instituted by Tarasuk the Defendant and other customers would have anywhere from a week to ten days to repay Tarasuk the principal and fee (R. Vol. II 49).

When Tarasuk began wiring money contrary to the terms of his contract with Western Union he made no disclosure to the Defendant or the other customers that he was operating in violation of Western Union regulations (R. Vol. II 46). In fact, Western Union apparently never enforced any of its regulations limiting the amount of money that could be sent (R. Vol. II 177-180) or that the remittance be timely paid by the agent (R. Vol. II 152-155).

The government selected a period from April 1, 1974, through May 10, 1974, and alleged that fifty money orders were sent by Tarasuk to the Defendant in intrastate commerce between San Antonio, Texas, Middletown, Virginia, and McAllen, Texas, pursuant to a scheme to defraud Western Union. The procedure uniformly followed was for Tarasuk to wire a money order from San Antonio, Texas, to the Defendant in McAllen, Texas, either in the Defendant's own name or in the name of one of his employees or family. The Defendant would then transfer all or a portion of the funds back to Tarasuk by means of a bank transfer. Although for over ten years sixty-five percent of Tarasuk's customers had received Western Union money orders in this manner, the Government prosecuted this Defendant individually on fifty counts of wire fraud and obtained convictions on all counts.

The Defendant appealed his conviction and contended that the use of the wire was not interstate for the point of origination and point of destination were within the State of Texas. The Defendant also urged the Appellate Court that if there were interstate transmissions, that they were incidental, minimal and not essential to the scheme. The Court of Appeals for the Fifth Circuit affirmed the lower court holding the transmissions were interstate and that the delay "triggered by the messages" was essential to the success of the scheme.

REASON FOR GRANTING THE WRIT: QUESTION PRESENTED.

1. WAS THE USE OF WIRED MONEY ORDER INTERSTATE COMMERCE WITHIN THE SCOPE OF THE ACT.

a. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Under the provisions of 18 U.S.C. § 1343 certain requirements must be satisfied before the use of the "wire" constitutes a federal offense. First, the transmission must be interstate; and second, it must be for the purpose of executing a scheme to defraud. The facts of the instant case do not satisfy either requirement for the transmissions were intrastate and in no way furthered the execution of the scheme to defraud.

Since the enactment of 18 U.S.C. § 1343, there has not been a single reported case wherein the transmission's point of origination and destination where within the same State.

The Court of appeals in their decision decided for the first time that a transmission initiated and concluded within the same State comes within the purview of 18 U.S.C. § 1343. This decision dangerously expands federal jurisdiction for under this decision any time a Western Union money order is wired federal jurisdiction is invoked. This is the case for under the undisputed facts every time money is wired an electronic impulse is routinely routed through a computer terminal in Middletown, Virginia.

In *Wentz v. United States,* 244 F2d 172 (9th Cir. 1957) a similar question of jurisdiction arose. The Court in interpreting 18 U.S.C. § 1343 examined the definitions of "interstate communications" as set forth in the Communications Act of 1934 which was the source for the provision set forth in 18 U.S.C. § 1343. Therein an "interstate communication" is defined as a transmission *from* any state...*to* any other state...but shall not include wire communications between points within the same state." Id. at 174. The underpinning for the Court's decision in *Wentz* was a finding that "when the message ceased to be an electric signal and took on tangible form for retransmission that the corpus delecti of the crime was complete." Id. at 175.

In the case at bar, the electric signals were never reduced to tangible form. They were sent from San Antonio, Texas, to McAllen, Texas, via a computer terminal in Virginia. The Petitioner contends the Court's decision dangerously expands the

concept of an interstate communication to the point as Judge Gee pointed out during oral argument, that a telegram sent by wire from El Paso to Dallas would be an interstate communication if one of the poles carrying the wire were located in New Mexico. This decision supports that view, and contravenes the underlying legislative intent.

b. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

The decision in *Wentz v. United States,* supra, is in direct conflict with the opinion reached by the Court of Appeals in the instant case. As theretofore stated, the Court in *Wentz* specifically excludes wire communication between points within the same State from interstate fraud. The Court concluded that the corpus delicti was complete only "when the message ceased to be an electronic signal."

The instant case is in direct conflict with the *Wentz* decision for the electronic signal originated in San Antonio, Texas, and remained an electronic signal until it was received in McAllen, Texas. Petitioner would urge this Court and it is imperative that this conflict be resolved and for this Court to adopt the "origination-destination" approach of *Wentz* for determining the interstate character nature of the transmission.

c. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED A FEDERAL QUESTION IN A WAY CONFLICTING WITH THE APPLICABLE DECISION OF THIS COURT INTERPRETING THE FRAUD PROVISIONS OF TITLE 18.

The cases are clear and specific in stating that minimal or incidental interstate involvement is not sufficient to create federal jurisdiction under the Fraud Provisions of Title 18. *Kann v. United States,* 323 U.S. 88, 65 S. Ct. 148, 89 L. Ed. 88 (1944); *Parr v. United States,* 363, U.S. 370, 80 S.Ct. 1171, 4 L. Ed. 2d 1277 (1960); *United States v. Maze,* 414 U.S. 395, 94 S.W. 645,

38 L. Ed. 2d 603 (1974). In the instant case, counsel stipulated that the Western Union money order or telegraph between San Antonio, Texas, and McAllen, Texas, travels by wire through a computer terminal in Middletown, Virginia, (R. Vol. I 32). There is no testimony or evidence concerning why the telegram passed through Middletown, Virginia, or how this assisted the execution of the alleged scheme. The Government, however, stated in its opening statement that "if you are anyplace in the country and you send a Western Union money order, its going to go through this terminal computer which is located in Middletown, Virginia." (R. Vol. II 29). The Defendant contends that this routing business procedure which is uniformly followed in the wiring of all money orders constitutes, at best, minimal and incidental interstate involvement and is not sufficient to satisfy the jurisdictional requirement of interstate fraud.

The Court of Appeals held that the routing of the electronic signal through Middletown, Virginia, was essential to the scheme to defraud. The Court premised its decision on the statement that the interstate transmission "triggered" a delay which permitted the Defendant time to carry out the scheme to defraud. This is simply not the case for there was no delay in the transmission of the money order. The evidence is clear and undisputed that the transmissions were sent and received the same day. (Gov't Brief, p.6) The delay that made it possible to defraud Western Union was the ten day grace period Tarasuk had to remit money to Western Union for money orders purchased and wired. (R. Vol. II, 43-49) (Gov't Brief, p.3) The Government has never contended that there was a delay in transmission that furthered the execution of the scheme. To the contrary the Government's position is that when money is wired a transmission must be sent to Middletown, Virginia, and thus interstate transmission is involved. The Appellate Court is therefore in error when it states that the delay in transmission was at the "heart of Davila's scheme" and that it was the "key that opened the Western Union cash box to him." It is clear that the "interstate record keeping process" did not delay the

transmission and did not further any scheme, rather it helped defeat the scheme for it kept a precise record of all money that was wired. The Petitioner urges to this Court that the routine routing of the electronic signal through Virginia was an incidental record keeping process that is not sufficient to vest the Federal Court with jurisdiction over this offense.

A comparable example of incidental interstate involvement was the use of "packing slips" in *United States v. Tarnopol,* 561 F.2d 466 (3rd Cir. 1977). This was a mail fraud prosecution wherein the Government alleged that the Defendant was selling records and concealing the sales in order to defraud artists, songwriters and publishers out of royalties. A "packing slip" accompanied each shipment and a copy was mailed from the plant in New Jersey to the offices of the Defendant in New York. The Defendants argued that the receipt of the shipping confirmations mailed in the ordinary course of business was too remote from the fraudulent scheme and played no part in bringing the alleged fraudulent scheme to fruition. The Court of Appeals in reversing the convictions agreed and stated:

> This was a routine business procedure which was uniformly followed in the case of all sales, whether or not they were involved in the scheme to defraud. The procedure was itself intrinsically devoid of any element of fraud and, indeed, it or its equivalent would appear to have been necessary in the conduct of legitimate business... Id. at 472
>
> ...
>
> ...And the use of the packing slips to keep track of sales, shipments and moneys due was clearly a legitimate business use wholly unrelated to the fraud. Moreover, we think that the use of the packing slips which necessarily involved the receipt by the purchasers of the original slips and Columbia's retention of copies of them, tended to threaten the success of the fradulent scheme rather than to further it. For it was important to the success of the scheme that the unrecorded sales for cash or merchandise be concealed. Indeed, it would appear that the fraud would have been better served if no packing slips had been in existence. Id. at 473

The transmission by Western Union to its own computer in the instant case closely parallels the packing slips in the *Tarnopol* decision. In both instances it was routine business procedure that in no way furthered the alleged scheme or assisted in its execution.

CONCLUSION.

The prosecution in this instance involves an intrastate telegram that does not fall within the ambit or scope of 18 U.S.C. § 1343. To uphold the prosecution under the facts of this case is tantamount to making every use of Western Union wires a federal offense without regard to where the wire is sent or for what purpose.

For the reasons set forth above, the decision of the Court of Appeals in the instant case raises substantial questions of general importa ce in the administration of criminal justice, and it is, therefore, respectfully submitted that this Petition for Certiorari be granted.

Respectfully submitted,

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June 13, 1979.

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bernardo Moreno DAVILA,
Defendant-Appellant.

No. 77-5427.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
April 10, 1979.

Defendent was convicted in the United States District Court for the Western District of Texas, Dorwin W. Suttle, J., of violating federal law by using interstate telegraphic wire services in a scheme to defraud. Defendant appealed, and the Court of Appeals, Gee, Circuit Judge, held that: (1) the evidence was sufficient to establish a scheme to defraud, and (2) even though the wires had their origin and destination within the same state, where the wires actually traveled thousands of miles interstate and the interstate involvement furthered defendant's scheme, there was "interstate commerce" within the scope of federal statute.

Affirmed.

1. Telecommunications 363

Viewed in the light most favorable to the government, evidence concerning defendant's participation in large-scale "kiting" operation which left telegraph company short almost $68,000 clearly supported inference that defendant had devised a scheme to defraud the telegraph company within scope of statute which provides penalties for using interstate telegraph wire services in a scheme to defraud. 18 U.S.C.A. § 1343.

2. Telecommunications 362

Fact that wires utilized in "kiting" scheme were sent from point to point within a single state did not take wires outside scope of statute which provides penalties for using interstate telegraphic wire services in a scheme to defraud where the wires were actually routed through another state and traveled thousands of miles interstate and where the interstate wires were essential to the fraudulent scheme by reason of fact that it was delay occasioned by the transmissions which made it possible for defendant to defraud telegraph company of nearly $68,000. 18 U.S.C.A. § 1343.

Appeal from the United States District Court for the Western District of Texas.

Before COLEMAN, GEE and HILL, Circuit Judges.

GEE, Circuit Judge:

Davila was convicted of violating 18 U.S.C. § 1343, by using interstate telegraphic wire services in a scheme to defraud. The statute reads:

> Fraud by wire, . . . Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Davila had a produce business in the San Antonio Produce Terminal. One Tarasuk (an unindicted co-conspirator) ran a financial enterprise in the same building and acted as a contract agent for Western Union. As a part of his business Tarasuk wired money; under Western Union rules he was to require prepayment before doing so, but there was a chink in the regulation: Western Union allowed him a week to ten days grace to remit. Tarasuk took advantage of this by "lending" Western Union funds over short periods to his customers, wiring money and money orders without prepayment so long as they paid him within the seven- to ten-day grace period and pocketing a fee for this ingenious little service.

Defendant Davila began to avail himself largely of Tarasuk's service when, in the fall of 1973, he set about to expand his produce business in the Rio Grande Valley. He needed a line of credit, and in order to get it he asked Tarasuk to wire money orders to him. The amounts grew from $3,500 in October of 1973 up to as high as $152,000 in April 1974. Some money orders were wired to other names — his employees and family members, including his wife, using both her married and maiden names — but all the money wound up with Davila. As these amounts grew Tarasuk experienced difficulty in repaying Western Union on time. To cope with this problem, Davila set up a bank account in the Valley town of McAllen; he began to deposit some of the wired money orders with the McAllen bank as soon as he received them, asking the McAllen bank to make a bank-to-bank wire transfer to Tarasuk's San Antonio account. The purpose of this maneuver was apparently a classic "kite": retiring prior "loans" with new Western Union funds. In due course the scheme ended, leaving Western Union short almost $68,000.

For purposes of this trial the government selected a period between April and May 1974, alleging that fifty money orders were wired by Tarasuk to the defendant in interstate commerce pursuant to a scheme to defraud Western Union. The facts were largely uncontested, and the defendant was convicted on all fifty counts, receiving concurrent sentences. The "interstate" portion of the wiring operation is the curious feature of this case: all Western Union wire money transfers are routed through Middletown, Virginia, so that the wires travelled thousands of miles interstate, from San Antonio to Middletown to McAllen, though the two Texas cities are less than three hundred miles apart on a direct line lying entirely within Texas.

Was There Sufficient Evidence of a Scheme to Defraud?

[1] Davila contends that the evidence was insufficient to show a scheme to defraud. He argues that, according to Tarasuk's testimony, Tarasuk himself did not intend to defraud Western Union. Davila testified that he did not know the funds were from Western Union, that he did not know why Tarasuk kept sending him money, and that he kept sending the funds back because they were unsolicited. Clearly the jury could have disbelieved this unlikely testimony and inferred a scheme to defraud from the record evidence of (1) Davila's knowledge of Western Union regulations; (2) his kiting scheme established to repay prior loans; and (3) his receipt of money wired in the names of third persons. For good measure, the record includes further evidence that the defendant paid Tarasuk for the "loans" of Western Union funds and that before the defendant

1. Davila also cites *Parr v. United States*, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed. 2d 1277 (1960), holding that use of the mails to collect school taxes did not violate the mail fraud statute even though some of those who caused the mailings planned to steal some portion of the receipts after they came in. The mailings in question were entirely legal, indeed required by state law; and the amounts claimed in them were not improperly inflated. Thus, the mailings were not part of the plot, being themselves perfectly proper and as appropriate to lawful collections as to any scheme to misappropriate moneys after or as collected.

and Tarasuk set up the money-wiring operation Western Union had cancelled Davila's line of credit when he failed to repay wired money within a day. This evidence, viewed in the light most favorable to the government, clearly supports the inference that Davila had devised a scheme to defraud Western Union.

Davila also argues that Western Union was not defrauded because it knew of the scheme. He points out that Tarasuk's "loan" practices were long established and were patronized by many customers. The Western Union regulations, however, do require prepayment; and even if Western Union acquiesced in prior arrangements of small "loans," there is no reason to think that it knew of or acquiesced in this large-scale operation — especially when it progressed to the "kiting" stage.

Was the Defendant's Use of Wired Money Orders Interstate Commerce Within the Scope of the Act?

[2] A more unusual question is posed by Davila's contention that the statute was not meant to cover wires sent from point to point within a single state, saying that the routing through Virginia was purely incidental and that the interstate character of the transfers was not essential to the scheme. He cites *United States v. Maze,* 414 U.S. 395, 94 *S.Ct.* 645, 38 L.Ed.2d 603 (1974); *Kann v. United States,* 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944); and *United States v. LaFerriere,* 546 F.2d 182 (5th Cir. 1977), three mail fraud cases, each involving the use of the mails *after* consummation of a fraud. Each of these cases ruled that such an after-the-fact use of the mails did not fall within the mail fraud statute because it was not made in execution of the fraudulent scheme.[1] Davila argues that, by a parity of reasoning, sending the wire messages in question *interstate* did not assist his scheme (presumably since an intrastate transmission would have done as well) and that, like the packing slips in the *United States v. Tarnopol,* 561 F.2d 466 (3d Cir. 1977), these transmissions were too minimal and incidental an interstate involvement to satisfy the jurisdictional requirement of interstate fraud. It will not do.

For the after-the-fact mailings in the cases cited were outside the frauds there in question entirely, came after they had been brought off, and did nothing to further their accomplishment. And the court in *Tarnopol* noted that the mailing of the packing slips there in question, so far from furthering that scheme, provided a record of the fraudulent, sales sought to be concealed and "tended to threaten the success of the fraudulent scheme rather than to further it." 561 F.2d at 473. In sum, these cases hold no more than that where the interstate involvement is not in furtherance of the scheme but aside from it, a prosecution will not lie.

No such thing can be said of the interstate messages in this case. To be sure, it was not interstate transmissions (or any other kind) that Davila sought, but rather the delay — triggered by the messages — that Tarasuk's practices permitted while Western Union's money was in Davila's hands. But it was the very transmissions which Davila would brush aside as incidental that placed the money in his hands to hold during Tarasuk's forbearance, and these transmissions were of necessity interstate — Tarasuk furnished no comparable intrastate service. Thus, at the heart of Davila's scheme lie interstate transmissions; they were the key that opened the Western Union cash box to him. A safecracker might with equal want of cogency argue that he was not chargeable with using explosives illegally since what he really wanted was not dynamite but only money. These same observations dispose of Davila's argument that the wires in question were features of his scheme too minimal and incidental to satisfy jurisdictional demands.[2] They were not incidental; they were essential, and they went of necessity on interstate facilities.

AFFIRMED.

A4

2. Davilla does not attack the statute on due process grounds or contend that a want of knowledge on his part that the messages went interstate places him outside it, and we leave such questions for another day. *But cf. United States v. Feola,* 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); and *Bibbins v. United States,* 400 F.2d 544 (9th Cir. 1968), and cases there cited.

A5

United States Court of Appeals
Fifth Circuit
Office of the Clerk

May 24, 1979

To All Parties Listed Below:

No. 77-5427 — U.S.A. v. Bernardo Moreno Davila

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By SALLY HAYWARD
Deputy Clerk

cc: Messrs. Roy R. Barrera
Messrs. Terrance McDonald
Ms. Leroy Morgan Jahn

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

No. 78-1919

In The Supreme Court of the United States

OCTOBER TERM, 1978

BERNARDO MORENO DAVILA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 592 F.2d 1261.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1979. A petition for rehearing was denied on May 24, 1979 (Pet. App. A5). The petition for a writ of certiorari was filed on June 26, 1979, and is therefore

out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the wiring of money orders that are sent and received within the same state but are always routed through another state constitutes a transmission in interstate commerce sufficient to confer federal jurisdiction under the wire fraud statute, 18 U.S.C. 1343.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on 50 counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1–A4).

The facts, which are not in dispute, are summarized in the opinion of the court of appeals (Pet. App. A2). Petitioner operated a produce business in San Antonio, Texas. He was acquainted with Alexander Tarasuk, who ran a financial enterprise in the same building and acted as a contract agent for Western Union. When Tarasuk wired money, he was required by Western Union regulations to receive prepayment before doing so. However, Western Union allowed Tarasuk a grace period of a week to ten days to remit the payments. Tarasuk used this grace period as a way of making short-term loans; he would wire money without prepayment as long as the customer paid him within the 7–10 day period. Tarasuk sometimes received a fee from his customers for providing this service (Pet. App. A2).

When petitioner decided to expand his produce business in the Rio Grande Valley, he needed a line of credit and he began to make extensive use of Tarasuk's service. He asked Tarasuk to wire money orders to him, sometimes in the names of other members of his family. As the amounts grew, to as high as $152,000 in April 1974, Tarasuk began to have difficulty paying Western Union on time. To solve this problem, petitioner opened a bank account in McAllen, where he would deposit some of the wired money orders and then ask the McAllen bank to make a bank-to-bank wire transfer to Tarasuk's San Antonio account. In time, this "kiting" scheme of paying off old debts to Western Union with new Western Union funds ended, leaving Western Union short almost $68,000 (Pet. App. A2).

ARGUMENT

Although the wired money orders in this case were sent and received within the same state, all Western Union wire money transfers are routed through a computer terminal in Middletown, Virginia. This interstate component of the transmission was used as the basis for federal jurisdiction under 18 U.S.C. 1343, which prohibits the use of "wire, radio, or television communications in interstate or foreign commerce" for the purpose of executing any scheme to defraud. Petitioner contends that the interstate routing of the wire transmissions was purely incidental to an essentially intrastate communication and that this incidental interstate involvement in no way furthered the fraudulent scheme and therefore cannot create federal jurisdiction over the offense (Pet. 4–9).

1. It is sufficient for proving the interstate aspect of a wire fraud prosecution to show a very minimal use of some form of interstate communication. Once a scheme to defraud has been established, proof that one interstate telephone call or other wire communication was

made as part of the scheme will suffice to establish federal jurisdiction under 18 U.S.C. 1343. *United States* v. *Wise*, 553 F.2d 1173, 1174 (8th Cir. 1977); *Weisser* v. *Ciccone*, 532 F.2d 101, 104 n.6 (8th Cir. 1976); *United States* v. *Jackson*, 451 F.2d 281, 283–284 (5th Cir. 1971), cert. denied, 405 U.S. 928 (1972); see also *United States* v. *Aloi*, 511 F.2d 585, 599 (2d Cir. 1975). This is so because the interstate element of the offense is included only to provide a basis for federal jurisdiction. As the court explained in *United States* v. *Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971):

> The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself. * * * If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied.

In fact, it is not even necessary to show that the defendant knew that the communication he made was interstate in order to prove a violation of 18 U.S.C. 1343. *United States* v. *Blassingame*, *supra*, 427 F.2d at 330–331; see also *United States* v. *Feola*, 420 U.S. 671 (1975).

All Western Union money orders are routed through Middletown, Virginia. Thus petitioner's contention that the transmissions were intrastate (Pet. 5) is incorrect. The fact that the money orders in this case were sent in interstate commerce is no accident, it is a necessary consequence of wiring a money order. Wiring a Western Union money order is, by its nature, an interstate activity. The fact that it would have been possible to wire these money orders intrastate, if Western Union chose to administer its system differently, is immaterial. Sending a Western Union money order is necessarily a wire transmission in interstate commerce and thus is clearly an act within 18 U.S.C. 1343. There was,

in fact, no intrastate method that petitioner could have used to defraud Western Union; the use of Western Union wire transmission, a device necessarily in interstate commerce, was critical to the fraud scheme.

Contrary to petitioner's assertion (Pet. 5–6), the decision in *Wentz* v. *United States*, 244 F.2d 172 (9th Cir. 1957), in no way conflicts with the holding in this case. The question in *Wentz* was whether Section 1343 applied to a wire communication that originated in California, passed through Texas and had as its ultimate destination Mexico City. Although the statute in effect at the time did not include "foreign communications or transmissions," the court found that an "interstate transmission" had taken place when the telegram was sent first from Los Angeles to Dallas, where it was reduced to tangible form and transmitted again. Another wholly intrastate transmission took place in that case, from Dallas to San Antonio, but that transmission was not relevant to the court's decision. There was no transmission in *Wentz* that travelled without interruption from a point in one state, through another, and back to a point within the first state. Thus the court had no occasion to address the question whether the type of communication that occurred here was an "interstate transmission."[1] If anything, *Wentz* supports the decision of the court of appeals in this case, because the court there rejected the defendant's argument that

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[1] Moreover, the *Wentz* court was interpreting 18 U.S.C. 1343 prior to the 1956 amendments, which, as the court recognized (244 F.2d at 175), effected a change in the jurisdictional coverage of the statute. The statute interpreted in *Wentz* used the phrase "interstate transmission" which is taken from the Communications Act of 1934. The statute now refers to a wire transmission "in interstate * * * commerce," a phrase which has always been broadly construed as a basis for the federal jurisdiction. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256–257 (1964).

only the origination and destination, not intermediate points, were relevant. The court suggested that it would have reached a different result had the transmission gone directly from California to Mexico, instead of by way of Texas (244 F.2d at 175).

2. Petitioner also contends (Pet. 5-9) that the interstate transmission "in no way furthered the execution of the scheme to defraud" (Pet. 5). It is, of course, true that in order for petitioner's conduct to fall within the proscription of the statute, the transmission must be "for the purpose of executing" the fraudulent scheme. The use of the wires must be closely enough related to petitioner's scheme to further or contribute to the success of the scheme. See *United States* v. *Maze*, 414 U.S. 395 (1974).[2]

Petitioner argues that the interstate routing of the messages here did not further the execution of the fraud. This argument confuses the jurisdictional requirement of the statute with the substantive elements. The cases cited by petitioner do not support his position, for in those cases there was no doubt that the communication itself was in interstate commerce; the prosecutions failed because of lack of nexus between the communication and the fraudulent scheme. In *United States* v. *Tarnopol*, 561 F.2d 466 (3d Cir. 1977), a copy of a packing slip was mailed in interstate commerce. The court held that the mail fraud statute was not violated because mailing the packing slip copy was wholly unrelated to the fraud and, in fact, threatened its success. *Id.* at 473. Similarly, in *Kann* v. *United States*, 323 U.S. 88 (1944), and *United States* v. *Maze*, *supra*,

[2]Section 1343 is quite similar to 18 U.S.C. 1341, the mail fraud statute, and appears to have been patterned after it. Consequently, the courts have often looked to Section 1341 for guidance in construing Section 1343. *United States* v. *Louderman*, 576 F.2d 1383, 1387 & n.3 (9th Cir.), cert. denied, No. 78-5084 (October 10, 1978); *United States* v. *Donahue*, 539 F.2d 1131, 1135 (8th Cir. 1976).

the mails were not used until after the consummation of the fraud. In *Parr* v. *United States*, 363 U.S. 370, 390 (1960), the Court ruled that the mailings were not related to the fraud.

In contrast, there can be no doubt that the wire transmissions here were an integral part of petitioner's scheme. As the court of appeals correctly found (Pet. App. A3), without the use of wires, petitioner would not have received the money that he made use of at Western Union's expense. The 7-10 day grace period did not become operative until a wire transmission was sent. The fact that a wholly intrastate transmission would have served petitioner's purposes just as well as the interstate transmissions that actually took place does not diminish the importance to his scheme of the use of wire transmissions. The interstate character of the communications may have been incidental to petitioner's fraud, but the communications themselves—which were of necessity interstate because of Western Union's practices—were at the very foundation of the scheme.[3] *United States* v. *Jackson*, *supra*, 451 F.2d at 284.

In sum, all essential elements of a wire fraud offense were established in this case. A scheme to defraud was proven, the use of the wires was essential to the scheme, and the transmissions were sent interstate.

[3]Petitioner claims (Pet. 7) that the court of appeals found the interstate component of the wire transmissions essential to the fraudulent scheme because petitioner relied on the delay involved in the extra routing of the messages. This reasoning is erroneous, he argues, because there was in fact no delay occasioned by the routing of the transmissions through Virginia. Petitioner misreads the court of appeals' opinion. The court specifically noted that petitioner did not need the transmissions to be interstate in order for his scheme to succeed (Pet. App. A3). But the court held that the delay triggered by the wire transmissions, though not by their interstate character, was critical to the fraud. Because the money orders were in fact sent interstate, the court concluded that "at the heart of [petitioner's] scheme lie interstate transmissions" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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